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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE, Plaintiff and Respondent, v. JONATHON FRANK KRANTZ, Defendant and Appellant.	C060150 (Super. Ct. No. 08NCR06454)

Defendant Jonathon Frank Krantz entered a plea of guilty to possession of methamphetamine in exchange for consideration of his eligibility for drug program probation. (Pen. Code, § 1210.1 [undesignated section references will be to this code].) The trial court found him ineligible, denied ordinary probation,[1] and sentenced him to prison.

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[1] Judge Donald Byrd noted that he was well aware of defendant's history "almost since the time it started to appear on the criminal docket" (having represented him in juvenile proceedings in the 1980's). In denying ordinary probation, he pointed out that he could not remember if there was a period during a calendar year since defendant had turned 18 in which he had not

On appeal, defendant contends the trial court applied the incorrect criterion in determining his ineligibility for participation in drug program probation. We agree and remand for resentencing.

BACKGROUND

During a parole search of defendant's residence on July 29, 2008, narcotics task force agents discovered a stash of methamphetamine of nearly 13 grams. The agents arrested him for this offense and placed him in custody in the county jail. Upon being told of the arrest, defendant's parole agent indicated that he *would be* placing a parole hold on defendant.[2]

On August 13, defendant entered his plea of guilty before Judge McFarland. Defense counsel noted for the record his advisement to defendant that any eligibility for drug program

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served some time in jail or prison; and the increasingly serious nature of defendant's crimes.

[2] A parole hold is a detention under the authority of a parole agent for an alleged violation of parole pending an adjudicatory hearing on the charges, which should take place within 45 days. (See *In re Law* (1973) 10 Cal.3d 21, 24, fn. 2; *People v. Hunter* (2006) 140 Cal.App.4th 1147, 1153-1154 (*Hunter*); *Swift v. Department of Corrections* (2004) 116 Cal.App.4th 1365, 1371.)

As best we can tell from the probation report, defendant had a 2002 conviction for possessing methamphetamine (Super. Ct. Glenn County, No. 03SCR00428), for which he initially received drug program probation. However, he received a three-year prison term in 2005 on violating probation, apparently based on a new 2005 offense of possessing marijuana for sale (for which he received a consecutive eight-month term). Presumably it is for this prison term that he was on parole. There had been four previous violations of this parole between October 2006 and April 2008. The report does not specify the nature of these violations.

probation depended on "whether or not parole is willing to release the hold they have on him at this point in time." The exact nature of this hold is not identified.

The probation officer filed her report in advance of the September 19 sentencing hearing, in which she asserted that "Pursuant to Section 1210.1 . . . , the defendant is eligible to receive a grant of [drug program] probation . . . ; however[,] the defendant has a parole hold. If the defendant was granted probation, he would not be available to receive [drug program] services . . . ." The probation report does not further identify the nature of the parole hold.

At the sentencing hearing, defense counsel requested a hearing on the question of defendant's eligibility, stating that "although [defendant] has a hold out of parole on this matter, [he] is due to be released from parole within six weeks. So what I would ask the Court to do is set this matter for a contested hearing . . . because I believe in that short period of time he is . . . legally . . . entitled to [drug program] treatment . . . ." Defense counsel did not explain further what he meant by a "release[] from parole." The prosecutor simply echoed the probation report: "And so with a parole hold he's not eligible . . . ." The court agreed. The prosecutor noted that the court could always recall its sentence upon the release of the parole hold. Both the court and the prosecutor indicated that they believed any placement on drug program probation would be a waste of time in any event, given defendant's criminal

history.[3] The court, however, agreed to defer sentencing for a week to allow the probation officer to determine the intentions of the parole officer.

When the matter convened the following week on September 26 before Judge Byrd, the probation officer stated that defendant "will be in parole's custody until November 26, 2008, so we would ask the Court to go forward . . . and sentence the defendant today," because "[h]e's unavailable for probation." Again, she did not elaborate on the nature of the parole custody to which defendant was subject. Over the objection of defense counsel, the court then sentenced defendant to a three-year prison term.

DISCUSSION

When a defendant's present offense renders him eligible for drug program probation, this is a mandatory disposition over which a trial court does not possess any sentencing discretion. The sole exception is where there is evidence that the defendant is disqualified under other statutory criteria, or where the defendant cannot participate in the treatment programs because

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[3] Defense counsel reiterated that defendant's past history was irrelevant to his eligibility for drug program probation for his present offense. He was correct. (*People v. Muldrow* (2006) 144 Cal.App.4th 1038, 1042, 1047-1048 (*Muldrow*); *People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1073 (*Espinoza*) [emphasizing that *past* performance on probation/parole or in programs in *other* cases not material to eligibility in present case]; cf. *People v. Esparza* (2003) 107 Cal.App.4th 691, 699, fn. 7 (*Esparza*) [failure in past programs and "lack of interest in [narcotics addict program]" does not equate to refusal of drug treatment in present case].)

he is subject to an *executed* sentence of imprisonment or pending deportation proceedings whose outcome is inevitable. (*Espinoza*, *supra*, 107 Cal.App.4th at pp. 1074-1076; *Esparza*, *supra*, 107 Cal.App.4th at pp. 698-699.)

In a case predating by some two years the proceedings at issue here (*Muldrow*, *supra*, 144 Cal.App.4th 1038), the Court of Appeal discussed at length whether a mere parole hold of itself comes within the *Espinoza*/*Esparza* exception. As in the present case, the probation officer noted that the defendant "'has a parole hold . . . [and] is expected to return to custody for eight months on a parole violation, and therefore this officer feels he would not be eligible for participation in probation pursuant to . . . section 1210.1.'" (*Muldrow, supra,* at p. 1041.) The trial court denied drug program probation on that basis. (*Id.* at p. 1042.) *Muldrow* criticized the trial court for accepting "at face value the probation officer's conclusion that there was a parole hold for defendant and it was expected that he would be returned to prison." (*Id.* at p. 1047 [distinguishing *Esparza*, where the defendant was "committed to prison" so placing him on probation would have been superfluous].) Given the same provisions for drug treatment for parole violations (including a new nonviolent drug offense) rather than reimprisonment for the first two such violations, *Muldrow* found it entirely speculative--rather than the all-but-certain deportation in *Espinoza*--that the defendant would be unavailable to participate by reason of imprisonment, and therefore *Espinoza*'s reliance on a future proceeding was not

applicable to mere parole holds. (*Id.* at pp. 1043, 1047-1048.) The proper procedure, therefore, is for a trial court to grant drug program probation, subject to revocation in the event that the mere parole hold ripens into an actual incarceration. (*Id.* at p. 1048.)

In *People v. Enriquez* (2008) 160 Cal.App.4th 230 (*Enriquez*) (which also predates the proceedings at issue by several months), we cited *Muldrow* with approval, albeit in dictum, in the course of giving guidance on remand *to the present trial court* for the redetermination under proper procedures of whether a defendant had violated his drug program probation. (*Id.* at pp. 243-244 [it is *certainty* of incarceration or deportation that renders otherwise eligible defendant unavailable for treatment].)[4]

Muldrow is indistinguishable from the present case. No doubt stemming from the predisposed (and erroneous) mindset of the probation officer, the prosecutor, and the two judges who presided over defendant's plea and sentence,[5] the record does not reflect whether defendant was merely in county jail on the

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[4] We also directed that a judge other than Judge McFarland decide the matter in light of his "unabashed animosity" toward drug program probation. (*Enriquez, supra,* 160 Cal.App.4th at p. 244.)

[5] We do not interpret defense counsel's acquiescence in this misinterpretation of the law (that a mere parole hold of itself rendered him unavailable for treatment) to be any species of forfeiture, as placement in drug program probation is mandatory. (*Esparza*, *supra*, 107 Cal.App.4th at p. 699.)

parole hold in September awaiting a formal hearing[6] to be held before November, or had already returned to prison until November, as the People would have us presume (in their only response to *Muldrow*).[7] If, in fact, defendant was only on a parole hold awaiting his revocation hearing, then the trial court did not have any sentencing choice other than to grant drug program probation (subject to revocation in the event of defendant's reimprisonment for the parole violation). As in *Muldrow*, we must remand for the trial court to determine if defendant is eligible for drug program probation based on facts present at that time and the substantive law in effect in September 2008 (*Muldrow, supra,* 144 Cal.App.4th at p. 1049), including any other statutory criteria that would disqualify him.[8]

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[6] This detention does not of itself alter his status as being on parole. (*Hunter*, *supra*, 140 Cal.App.4th at p. 1153 [parole not revoked until after formal hearing, even if parolee incarcerated on parole hold].]

[7] We note that the court's "Notice[s] of Matter Set" indicate that copies of the notices were sent to the jail following the proceedings on September 19 and 26, but do not know what inferences to draw regarding whether defendant had returned to prison at that point.

[8] As neither the probation report nor the trial court relied on any such statutory criteria, it is not within the scope of this appeal to make that determination without any development in the record of the necessary underlying facts. Therefore, it was not necessary for defendant to address this possibility in his brief.

DISPOSITION

The judgment of conviction is affirmed and the matter is remanded for redetermination of defendant's eligibility for drug program probation under section 1210.1 based on the facts at the time of resentencing.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.